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No. 881573

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RODRIGO ALONSO, et al.,

Petitioners

v.

LEO'S QUALITY FOODS, et al.,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES	. . . . .	ii
I	STATEMENT OF THE CASE	1
II	REASONS FOR DENYING THE WRIT	17
	A. SUMMARY JUDGMENT FOR THE UNION WOULD BE PROPER UNDER ANY STANDARD	17
	B. PETITIONERS ARE SEEKING REVIEW ON AN ISSUE THEY DID NOT PRESENT TO THE COURT BELOW	22
III	CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Federal

Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1985) 24

G.D. Searle & Co. v. Cohn, 455 U.S. 404, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982) 25

Howard Johnson Co. v. Detroit Joint Board, 417 U.S. 249, 94 S.Ct. 2236, 43 L.Ed.2d 246 (1974) 5

U.S. v. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) 25

I

STATEMENT OF THE CASE

Leo's Quality Foods, Inc. ("Leo's" or "the Employer") was, until November 1984, a meat and poultry processor in Los Angeles, California. For more than twenty years prior to that time Leo's had been party to collective bargaining agreements with United Food and Commercial Workers Union, Local 274, AFL-CIO ("the Union" or "Local 274") covering Leo's production employees. On November 16, 1984, Leo's attorney, Frederick Richman, informed Donald Holeman, the President of Local 274, that Leo's was closing down its business, effective that day.

Richman told Holeman that Leo's assets were being sold to an individual named Steven Whittington, and that its former owner, Julius Bell, was to be completely divorced from the new operations. Richman also told Holeman that Whittington might continue to use the Leo's name but

was not likely to hire any of its employees and that, while Whittington was aware of the collective bargaining agreement with the Union, he apparently did not intend to execute a successor contract.[1/]

Holeman immediately arranged for an emergency membership meeting to be held the following Monday. Some 75 of the 100 or so Leo's employees attended this meeting, where Holeman related what Richman had told him and informed the workers that the Union's attorney would conduct an investigation to determine if any grounds existed for claiming that Whittington's new operation was Leo's "alter ego." Holeman cautioned the employees, however, that the sale to Whittington did not appear to be a sham entered into merely to

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[1/] Holeman Deposition, Union's Supplemental Excerpts of Record, pp.2-6, 8-14. All references to documents contained in the Union's Supplemental Excerpts of Record provided to the Court of Appeals are indicated by "[name of document], Supplemental Excerpts of Record, p. __."

avoid the Union contract.[2] He also urged the workers to apply for jobs with the new company, informed them of their rights under the collective bargaining agreement, and urged them to file grievances if they had any claims regarding payment of wages or monies owing to them.[3] The meeting lasted about an hour and a half.

After the meeting Holeman met with the Union's counsel, Glenn Rothner, an experienced labor attorney,[4] to discuss the closure and sale and the strategies available to the Union. Among the strategies they discussed was the possibility of filing a grievance under Article XXIX

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[2] Holeman Deposition, Union's Supplemental Excerpts of Record, pp.20-22.

[3] Holeman Deposition, Union's Supplemental Excerpts of Record, pp.20-23.

[4] Rothner Deposition, pp. 8-54, CR 82. All references to documents in the Certified Record on appeal to the Court of Appeals for the Ninth Circuit that are not included in either the Union's Supplemental Excerpts of Record or the Petitioners' Appendix are indicated by "[name of document], CR [docket number]."

of the collective bargaining agreement between Leo's and the Union.5/ After reviewing this language, they concluded that the Union did not have a viable suc-

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5/ That Article provided:

> **CHANGE IN OWNERSHIP**
>
> Section 1. If an Employer hereunder sells, leases or transfers his business or any part thereof, whether it be voluntary, involuntary, or by operation of law, it shall be his obligation to advise in writing the purchaser, lessee or transferee of the existence of this Agreement, of the requirement of this provision in particular, and of the names of the employees currently holding employment rights under this Agreement.
>
> Section 2. Such purchaser, lessee or transferee shall be bound fully by the terms of this Agreement and shall be obligated to pay the wages, vacations, fringes, sick and accident benefits and comply with all other conditions of this Agreement in effect at the time of the sale, lease or transfer. Such purchaser, lessee or transferee shall be obligated to continue this Agreement and the employment of those employed under this Agreement, including those subject to recall. The Union will similarly continue to be bound.

cessorship claim against either Leo's or Whittington. As Rothner explained to Holeman, in his opinion section 1 did nothing more than obligate the seller to notify the purchaser of the collective bargaining agreement, which Leo's had apparently done, but did not require the purchaser to adopt it or require adoption as a condition of sale.[6] As for section 2, Rothner advised Holeman that, in his opinion, this section was unenforceable under federal labor law, and in particular under the Court's decision in Howard Johnson Co. v. Detroit Joint Board, 417 U.S. 249, 94 S.Ct. 2236, 43 L.Ed.2d 246 (1974), as against a purchaser who did not agree to adopt the collective bargaining agreement.[7]

Rothner and Holeman discussed the other strategies available to the Union:

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[6] Rothner Deposition, Supplemental Excerpts of Record, p.40.

[7] Rothner Deposition, Supplemental Excerpts of Record, pp.28, 29, 30-31, 40.

(1) demanding the right to bargain with Whittington for a new collective bargaining agreement if a majority of the new workforce came from the Leo's bargaining unit,[8] (2) filing charges with the National Labor Relations Board if they had evidence that Whittington had refused to hire the Leo's employees because of their membership in the Union or their former employment by Leo's,[9] and (3) claiming that Whittington was bound to the existing Agreement between Leo's and the Union as the "alter ego" of Leo's.[10] The Union had no evidence at that time to support either of the first two claims.[11] As for the third theory, Holeman asked Rothner to

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[8] Rothner Deposition, Supplemental Excerpts of Record, p. 39.

[9] Rothner Deposition, Supplemental Excerpts of Record, p. 34.

[10] Rothner Deposition, Supplemental Excerpts of Record, p. 35.

[11] Rothner Deposition, Supplemental Excerpts of Record, p. 36.

investigate whether the new company could be bound by an alter ego theory.12/

Both Holeman and Rothner believed that it would be counterproductive to file an alter ego grievance before they had the evidence to support it.13/ As Rothner pointed out to Holeman, a premature alter ego claim might cause the purchaser to hire even fewer Union members than it would have otherwise.14/ Furthermore, the Union would be in a much stronger position to acquire evidence to support an alter ego claim if it had members working inside the new company.15/ Holeman asked Rothner to call Richman, the Employer's attorney, to obtain more information concerning the transaction and the new operation.

12/ Rothner Deposition, Supplemental Excerpts of Record, p. 35.

13/ Rothner Deposition, Supplemental Excerpts of Record, pp.43-44.

14/ Rothner Deposition, Supplemental Excerpts of Record, pp.43-44.

15/ Rothner Deposition, Supplemental Excerpts of Record, pp.44-46, 75-76.

Rothner called Richman later that week. In that conversation Richman told Rothner that Julius Bell was selling his interest in Leo's and getting out of the business entirely. The Leo's corporate entity would survive so that the purchaser of the failing business, Whittington, could benefit from both the goodwill associated with the Leo's name and a tax loss carry-forward under the Internal Revenue Code. Whittington would take fifty percent of the Leo's stock and Bell's son Robert, who heretofore had only a nominal interest in Leo's, would take the other fifty percent.16/

Richman informed Rothner, however, that Leo's would no longer be in the business of processing meat, but would now become strictly a marketing operation. The meat processing operation would be handled by Whittington's wholly-owned new

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16/ Rothner Deposition, Supplemental Excerpts of Record, pp.53-54, 57, 59.

company, The Whittington Company ("TWC"), which would in turn supply the Leo's marketing operation. Richman told Rothner that TWC would not necessarily be doing the same kind of meat processing as had been done at Leo's facilities. Rothner knew that Whittington had had no involvement in the direction of labor relations at Leo's, and was informed that Julius Bell, who had directed labor relations for his company, would not perform any work for Whittington's new company.17/

Richman offered to provide Rothner with the transactional documents. Rothner declined.18/ As discovery later revealed, all of Richman's representations proved to be true. The transaction between Leo's and Whittington was precisely as Richman

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17/ Rothner Deposition, Supplemental Excerpts of Record, pp.53-58.

18/ Rothner Deposition, Supplemental Excerpts of Record, p.59.

had described it[19] and Julius Bell has played no part in the business of either Leo's or TWC since the sale.[20]

After this discussion with Richman, Rothner reached the conclusion that no viable alter-ego grievance could be filed because the critical elements of an alter ego claim under federal labor law--continuity of management and continuity of control of labor relations--were missing. Rothner reviewed the question with two attorneys in his office to see if he had missed any plausible theories or promising strategies and then did additional research into these issues. His conclusion remained the same.[21]

Rothner testified that, as the Union's attorney, he had the authority to

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[19] Rothner Deposition, Supplemental Excerpts of Record, p.60.

[20] J. Bell Declaration, pp.7-8, Supplemental Excerpts of Record 5.

[21] Rothner Deposition, Supplemental Excerpts of Record, pp.56-57, 65, 68, 71, 72.

file, and indeed would have filed a grievance alleging that Whittington was an alter ego of Leo's if he had concluded that such a grievance could be supported.22/ If he had seen a viable grievance and Holeman could not have been reached, he either would have contacted another responsible Union official or would have taken it upon himself to make a timely claim under the contract.23/ Rothner chose, however, not to pursue what he believed was a futile claim.24/

Rothner advised Holeman of his conclusion when the latter returned from vacation. At that point they decided to continue monitoring the new company's hiring of Leo's former employees in order to develop evidence for a future

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22/ Rothner Deposition, Supplemental Excerpts of Record, p.64.

23/ Rothner Deposition, Supplemental Excerpts of Record, p.64.

24/ Rothner Deposition, Supplemental Excerpts of Record, p.65.

successorship or alter ego claim.[25] The Union's monitoring, however, turned up no evidence that either Julius Bell or his son Robert was playing any role in managing TWC or in setting labor relations policy for that company. In the absence of any such evidence of continuity in management or labor relations policy, the Union did not believe it could prove that TWC was an alter ego of Leo's.

On or about May 15, 1984 one of the Petitioners, represented by counsel for Petitioners, filed charges with the National Labor Relations Board against the Union, alleging breach of the duty of fair representation, and against Leo's, alleging that the Whittington Company was an alter ego of Leo's. Petitioners' counsel withdrew both charges after the Board

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[25] Rothner Deposition, Supplemental Excerpts of Record, pp.75-76.

informed the charging party that there was no basis to proceed.[26]

This lawsuit followed. Petitioners named Leo's, TWC, Julius Bell, Robert Bell, Arline Bell, Steven Hawk, Stephen Whittington, Eileen Whittington and the Union. Petitioners alleged that all of the defendants, save the Union, were alter egos of one another and that they had violated the collective bargaining agreement by selling the Company and discharging the Petitioners in connection with this sale. The Petitioners alleged that the Union had breached its duty of fair representation by not challenging the sale or discharges in arbitration. The Complaint's fifth cause of action charged the Employer Defendants with intentionally inflicting emotional distress on the

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[26] Declaration of Terri A. Tucker, Exhibits "A," "B," "C," and "D," CR 70.

Petitioners by the manner in which they discharged the Petitioners.[27]

The District Court initially denied the Union's motion for summary judgment on Petitioners' fair representation claims.[28] Following the Petitioners' separate settlement of their claim against Leo's, TWC and the individual defendants, the Union moved to strike Petitioners' demand for a jury trial and to dismiss their claim for damages for emotional distress. The District Court granted these motions.[29] The Union then renewed its motion for summary judgment, which the District Court granted.

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[27] The Petitioners subsequently amended their Complaint to allege additional causes of action. The only new cause of action against the Union, which alleged age discrimination on its part, was dismissed by the District Court. CR 52. Petitioners did not appeal from that dismissal.

[28] CR 52.

[29] CR 80.

In ruling for the Union, the District Court held that Rothner acted reasonably in relying on Richman's description of the transaction and in analyzing the law applicable to this situation. The Court further held that Rothner's conclusion that no viable claims could be asserted under the collective bargaining agreement was reasonable.[30/] As the District Court stated, in ruling from the bench, while the court might have made a different assessment of the transaction than the Union did,

> I don't think . . . that everybody . . . would have had to see that complex of contracts the way I see them. And I am not critical of the effort, the decision to review the thing in the way it was reviewed, or the efforts that went behind it.

30/ Supplemental Findings, Appendix, p.17.

It's not only that I'm not outraged by it, I'm not even critical of it.[31]

The Court of Appeals affirmed the judgment in an unpublished decision. The Court of Appeals held that the Union did not act either discriminatorily or in bad faith in deciding not to pursue an alter ego claim that it did not believe it could support,[32] that the Union's investigation and handling of this alter ego claim was not inadequate or perfunctory,[33] and that further investigation would not have produced a different result.[34]

Because of its decision on the merits of Petitioners' fair representation claim, the Court did not reach the District

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[31] Reporter's Transcript of Hearing, Appendix, pp.24-25.

[32] Memorandum Decision, Appendix p. 11.

[33] Memorandum Decision, Appendix pp. 12-13.

[34] Memorandum Decision, Appendix pp.13-14.

Court's rulings on the jury trial and emotional distress issues.[35] Petitioners subsequently moved for reconsideration, which the panel denied without further briefing or opinion.[36]

II

REASONS FOR DENYING THE WRIT

A. SUMMARY JUDGMENT FOR THE UNION WOULD BE PROPER UNDER ANY STANDARD.

The Petitioners claim that *certiorari* is necessary in order to resolve the alleged conflict between the Circuits regarding "whether gross negligence is sufficient conduct so as to breach the duty of fair representation." (Petition, p.20) They further argue that this case is "a good vehicle" for resolving this

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[35] Memorandum Decision, Appendix p. 14.

[36] Order Denying Rehearing, Appendix p.1.

alleged conflict because of its unique factual and procedural setting. (Petition, p.33) But this case is, in fact, entirely inappropriate for this purpose, since judgment for the Union was proper under any conceivable standard.

This case does not turn on any distinction between "gross negligence" and "intentional misconduct." As both the District Court and the Ninth Circuit held, the Union's handling of this grievance was reasonable. That holding satisfies any standard--"negligence," "gross negligence" or "intentional misconduct"--imposed by any Court.

The critical facts are not in dispute: the Union's president directed Rothner to investigate the merits of an alter ego claim, Rothner spoke with the Employer's attorney several days later, and, based on that discussion and his analysis of the law, concluded that the Union did not have any viable successor-

ship or alter ego claims. The Union elected, on the basis of Rothner's analysis, not to file a grievance.

The District Court held that Rothner was justified in relying on Richman's explanation of the transaction, that Rothner's analysis of the merits of an alter ego claim was reasonable, and that his conclusion that the Union did not have a viable grievance was reasonable.37/ The Ninth Circuit affirmed, finding that the Union did not ignore a meritorious grievance or handle it in a perfunctory manner. It rejected the Petitioners' complaints that the Union failed to obtain copies of the transactional documents, return their telephone calls or investigate the identity of management and supervisory personnel by noting that in no case would further investigation have produced any facts

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37/ Supplemental Findings of Fact and Conclusions of Law, Appendix, p.17.

that would have altered or influenced the Union's decision.[38/]

The Ninth Circuit clearly did not consider the Union's investigation to be "negligent but excusable." On the contrary, the Court of Appeals' determination that further investigation would not have produced a different result establishes that the Union did everything that could be expected of it in these circumstances.

While the Petitioners complain that the Court should have judged the Union's conduct by a "gross negligence" standard, they have not suggested anywhere in their Petition just how they would have obtained a different decision if the Court of Appeals had applied that (or any other) standard. That omission is telling, for it shows just how little their Petition has to do with any overarching issues of general significance.

38/ Memorandum Decision, Appendix, pp.13-14.

Instead their Petition is almost entirely devoted to a single factual issue that is unique to this case and that has nothing to do with any conflict in the Circuits. The Petitioners insist that the Union must have made the decision not to file a grievance without conducting any investigation because Holeman was on vacation when the last day to file a grievance passed. Petitioners ignore the salient fact that it was Rothner, not Holeman, who decided, based on his investigation of the facts and analysis of the law, that the grievance did not have merit. Petitioners likewise do not mention Rothner's uncontradicted testimony that he could and would have filed a grievance if he had felt that the Union had any viable alter ego claim. The Petitioners' "failure to investigate" theory simply cannot be squared with the uncontroverted facts.

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But even if their theory had some merit, this would still not be an appropriate case for *certiorari*. Petitioners' claim involves issues of interest only to the parties involved in this action, rather than issues of general significance. There is no reason for this Court to grant *certiorari* in order to review an issue which the Petitioners have already presented twice to the Court of Appeals without success. The Petition should be denied.

B. PETITIONERS ARE SEEKING REVIEW ON AN ISSUE THEY DID NOT PRESENT TO THE COURT BELOW.

Furthermore, this would still not be an appropriate case to test the distinction between "gross negligence" and "intentional misconduct," even if this case actually turned on that distinction. The Petitioners argue that all Union decisions, both ministerial actions involved

in the processing of grievances and "judgment calls" regarding the merits of a grievance, should be reviewed under a "gross negligence" standard. Petitioners complain that the Ninth Circuit's distinction between "ministerial conduct" and decisions in which "a union's judgment . . . is in question" represents a "fundamental injustice." (Petition, p. 28) But the Petitioners never objected to the Ninth Circuit's distinction between ministerial and non-ministerial acts when this case was before that Court.

On the contrary, they embraced the distinction. As the Petitioners summarized their arguments in their opening brief on appeal:

> Plaintiffs say Local 274 breached the duty of fair representation in two distinct ways. First Local 274 failed to do the ministerial act of filing a timely grievance. Second, Local

> 274 conducted a merely perfunctory inquiry into the merits of the grievance. Different legal standards apply to these two charges.

(Brief for Appellants, pp. 18-19; emphasis added). Petitioners then opened their argument with a discussion of the distinction between ministerial and non-ministerial acts which the Ninth Circuit made in Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1985) and applied that distinction to the facts of this case. Petitioners never complained that this distinction was unwise or improper, much less that it represented a "fundamental injustice."

Petitioners are asking this Court to grant *certiorari* to review an issue which they did not raise in the Court below. It is too late for the Petitioners to raise that argument or to attack a distinction which they invited the Court below to

apply. G.D. Searle & Co. v. Cohn, 455 U.S. 404, 412 n.7, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982); U.S. v. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975). Their Petition should be denied on this ground alone.

III

CONCLUSION

The Petition should be denied.

DATED: April 20, 1989

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